where a person left his auto parked on the side of a hill and the car from some unknown cause rolled down the hill and hit plaintiff; *Scovannin* v. *Toelke*, 119 Ohio St. 256, 163 N.E. 495 (1928) where a truck operated by the defendant ran off the highway and collided with and damaged a building, and no other testimony was produced to prove negligent operation of the truck; *Trauerman* v. *Oliver's Adm'r.* 125 Va. 458, 99 S.E. 647 (1919) where it was held that an auto driver who collided with another person while the latter was standing upon the sidewalk, must show that he did everything an ordinary reasonably prudent person would have done to avoid injury. In one Ohio case, however, no presumption or inference of negligence was held to arise. *Allen* v. *Learick*, 43 Ohio App. 100, 182 N.E. 139 (1932) where a guest passenger was not permitted to recover under the *res ipsa* rule for being thrown from the seat when the automobile bounced while crossing an intersection.

In the principal case the instrumentality was under the control of the defendant. Since an accident does not ordinarily happen by a car leaving the road if reasonable care is used, the application of the *res ipsa loquitur* doctrine to this situation seems justified.

JOSEPH STERN

CONSTITUTIONAL LAW

POWER OF BOARD OF EDUCATION TO COMPEL SALUTE TO FLAG — INVASION OF RELIGIOUS FREEDOM

Some time ago, the Board of Education of Greenfield, Ohio, established the rule that "the Superintendent of Schools is directed to require the flag salute and the pledge of allegiance from all pupils attending the Greenfield Schools at such times and on such occasions as he may direct." Ordinarily, the Superintendent required the salute and pledge of allegiance only at assemblies of a patriotic nature, but teachers were allowed to hold similar ceremonies as opening exercises. Though these practices had been in effect over a period of time, no one, parents or children, had objected until November, 1935. At that time, the parents of four pupils, who were members of Jehovah's Witnesses, a religious sect, ordered their children not to salute the flag. The board of education settled the problem by excluding these children from all exercises at which a flag salute or pledge of allegiance was to be given.

The same problem has arisen in East Liverpool, but it has not been solved so amicably. There, the board of education expelled those who

refused to salute or take the oath of allegiance. As a result, the mother of one of the expelled pupils, who is qualified to teach, is contemplating starting a private school for the children of Jehovah's Witnesses.

In a recent opinion, the attorney general upheld the action of the East Liverpool Board as being within their power and constitutional. No. 5003, 42 Ohio State Department Reports 183, Jan. 2, 1936. This formal opinion reversed a previous informal statement from the attorney general's office.

Jehovah's Witnesses are a religious sect and consider themselves the only true followers of Jesus Christ. Their name is derived from the belief that they are to witness the second coming of Christ. They have a covenant to obey God and Jesus Christ only, and, in their opinion, to break this covenant means their destruction. Pledging their allegiance to the flag would be a breach of the covenant, for their allegiance is to Jehovah only. They base their belief and action on the command of Exodus 20:3-5:

> Thou shalt have no other gods before me.
>
> Thou shalt not make unto thee any graven image, or any likeness of anything that is in the heaven above or that is in the earth beneath or that is in the water under the earth.
>
> Thou shalt not bow down thyself to them, nor serve them, for I, the Lord thy God, am a jealous God, visiting the iniquity of the fathers upon the children unto the third and fourth generation of them that hate me.

The flag salute is also a breach of their covenant, for the flag is an image or representation of the United States nation, and the salute amounts to an act of worshipping this image.

The first problem raised by the situations described above is whether or not the board of education had the power to establish the rule involved. A board of education has the power to "make such rules as it deems necessary for the government of the pupils of its schools." G.C. 4750. It also has the power to arrange the course of study to be followed in its schools, G.C. 7645, and the general power to manage and control all public schools within its district. G.C. 7690. The rule allowing the superintendent to require the flag salute and pledge of allegiance might well be sustained under any one of these powers. These powers are general, and so any action taken under them would be discretionary as to its details.

There is abundant authority to support the statement that, in the absence of fraud or bad faith, the courts will not interfere with the board of education's exercise of its discretionary powers to manage and control schools or establish rules and regulations for them unless such exercise is so arbitrary and unreasonable as to be an abuse of its discre-

tion. *Board of Ed.* v. *Boehm*, 102 Ohio St. 292, 131 N.E. 812 (1921); *State* v. *Board of Ed.*, 11 Ohio App. 146, 30 O.C.A. 365 (1919); *Brannon* v. *Board of Ed.*, 99 Ohio St. 369, 124 N.E. 235 (1919); *Wagoman* v. *Board of Ed.*, 5 Ohio App. 380, 27 O.C.A. 267 (1916); *Cline* v. *Martin*, 5 Ohio App. 90, 24 C.C. (N.S.) 81 (1915); *Board of Ed.* v. *State*, 80 Ohio St. 133, 88 N.E. 412 (1909); *Board of Ed.* v. *County Comm.*, 10 N.P. (N.S.) 505 (1909); *State* v. *Milhoff*, 76 Ohio St. 297, 81 N.E. 568 (1907); *Youmans* v. *Board of Ed.*, 11 C.C. 207, 7 C.D. 269 (1896); (rule that pupil could be expelled for failure to have lesson prepared held reasonable) *Sewell* v. *Board of Ed.*, 29 Ohio St. 89 (1876). But courts have interfered with the exercise of discretionary powers by the boards of education where such exercise was arbitrary and unreasonable. *Robinson* v. *McDonald*, 5 Ohio App. 376, 26 C.C. (N.S.) 137 (1916); *Owens* v. *Board of Ed.*, 25 O.C.C. (N.S.) 581, 25 O.D. 161 (1914).

Where the board of education repealed a rule requiring reading of the Bible in school and established a rule prohibiting it, *Board of Ed.* v. *Minor*, 23 Ohio St. 211, 13 Am. Rep. 233 (1872); *Board of Ed.* v. *Pulse*, 7 O.N.P. 58, 10 O.D. (N.P.) 17 (1900), and where the board passed a rule requiring the reading of the Bible in school, *Nessle* v. *Hun*, 1 O.N.P. 140, 2 O.D. (N.P.) 60 (1899), it was held that the actions were reasonable and beyond the reach of the courts. Such regulations raise the issue of freedom of conscience, as guaranteed by the Ohio Constitution, more directly than the rule as to saluting the flag.

From these authorities, it would seem that the establishment of the rule of the Greenfield Board of Education would be within the power of the board if it is reasonable and not arbitrary. This is purely a matter to be decided at the trial.

The Jehovah's Witnesses maintain that even though this is a proper and valid rule, it interferes with their religious freedom. The Ohio Constitution says: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience," Art. I, Sec. 7, and the 14th Amendment to the Federal Constitution provides that "no state shall deprive any persons of life, liberty, or property without due process of law."

The 14th Amendment must be considered here, for religious freedom is one of the liberties protected, *Meyer* v. *Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. ed. 1042 (1923), but the 1st and 5th Amendments are inapplicable, for they restrict the actions of the Federal government only.

The maintenance of public schools, *Fawcett* v. *Ball*, 80 Cal. App.

131, 251 Pac. 679 (1923), and the promotion of public education, *Broderick* v. *Stone*, 258 N.Y.S. 717, 144 Misc. Rep. 393 (1932), are governmental functions. Thus the establishment of rules and regulations for schools is within the police power, i.e., the general regulatory power, of the state. *Pohl* v. *State*, 102 Ohio St. 474, 132 N.E. 20 (1921); *Meyer* v. *Nebraska, supra.* Any rule-making power the board of education may have is derived from the state's general power to legislate, and any exercise of such power is an exercise of the state's police power.

Personal and private rights guaranteed by constitutions are not absolute. They are subject to reasonable regulations which may be imposed by the legislature. *Pohl* v. *State, supra.*; *Soloman* v. *Cleveland*, 26 Ohio App. 19, 159 N.E. 121 (1926); *State* v. *Powell*, 58 Ohio St. 324, 40 N.E. 900 (1898); ("religious freedom does not deprive the legislature of its legislative power"), *New Braunfels* v. *Waldschmidt*, 109 Tex. 302, 207 S.W. 303 (1918). However, any exercise of the police power will be invalid if it unreasonably or arbitrarily invades personal rights, *Merick* v. *Gims*, 79 Ohio St. 174, 86 N.E. 88 (1908), or if it is not related to the "public use or public benefit." *Alma Coal Co.* v. *Cozad*, 79 Ohio St. 348, 87 N.E. 172 (1909). The legislature cannot interfere with personal rights unless the public welfare requires it. *State* v. *Robins*, 71 Ohio St. 273, 73 N.E. 470 (1905).

Laws making bigamy a crime and making bigamists ineligible to hold public office have been held valid even though they directly interfered with the religious practices and teachings of the Mormons. For the protection of public morals, religious freedom may be invaded. *Reynolds* v. *U. S.*, 98 U.S. 145, 25 L. ed. 244 (1878); "The laws cannot interfere with religious beliefs, but they may with practices." *Toncray* v. *Budge*, 14 Ida. 621, 95 Pac. 26 (1908); *Miles* v. *U. S.*, 103 U.S. 304, 26 L. ed. 481 (1880); *Davis* v. *Beeson*, 133 U.S. 333, 10 S. Ct. 299, 33 L. ed. 637 (1889); *The Late Corporation of the Church of Jesus Christ of Later-Day Saints* v. *U. S.*, 136 U.S. 1, 10 S. Ct. 792, 34 L. ed. 478 (1890).

Likewise, religious freedom must give way to legislation in the interests of public health. Requiring a Christian Science healer to have a license to practice medicine is not an unconstitutional interference with his religious freedom, *State* v. *Marble*, 72 Ohio St. 21, 73 N.E. 1063 (1905); *State* v. *Miller*, 59 N.D. 286, 229 N.W. 569 (1930); *State* v. *Verbon*, 167 Wash. 140, 8 Pac. (2d) 1083 (1932), and a New York statute which made it a misdemeanor to fail to furnish medical attendance to a minor was held valid even though the parents' religion

called for divine healing. *People* v. *Pierson*, 176 N.Y. 201, 68 N.E. 243 (1903). Excluding pupils who have not been vaccinated from public schools is valid, for the necessity of protecting the public health justifies any invasion of religious freedom involved. *Vonnegut* v. *Baum*, 188 N.E. 677 (Ind., 1934); *New Braunfels* v. *Waldschmidt*, *supra*.

The religious practices of the Salvation Army have been restricted in the interest of the public peace to the extent of requiring members of that organization to get licenses to play instruments or to parade in the streets. *Commonwealth* v. *Plaisted*, 148 Mass. 375, 19 N.E. 224 (1889); *In re Frazee*, 63 Mich. 396, 30 N.W. 72 (1886); *State* v. *White*, 64 N.H. 48, 5 Atl. 828 (1886). Ordinances which make it a misdemeanor to indulge in common labor on Sunday do not infringe anyone's religious freedom by requiring him to observe a religious holiday. *Bloom* v. *Richards*, 2 Ohio St. 387 (1853), *McGatrick* v. *Wason*, 4 Ohio St. 566 (1855); *State* v. *Blair*, 130 Kan. 863, 288 Pac. 729 (1930).

Measures adopted to promote the public welfare may validly invade religious freedom and other personal rights. Ohio decisions of long standing have held that rules requiring or prohibiting Bible reading in public schools are valid and do not violate freedom of worship. *Board of Ed.* v. *Minor*, *supra.*; *Board of Ed.* v. *Pulse*, *supra.*; *Messle* v. *Hun*, *supra.* More recently, the Georgia court has adopted the same view, *Wilkerson* v. *City of Rome*, 152 Ga. 762, 110 S.E. 895 (1922), and other states have followed it with the qualification that compulsory Bible reading is constitutional only if those who do not want to listen are allowed to retire. *People* v. *Stanley*, 81 Colo. 276, 255 Pac. 610 (1927); *Kaplan* v. *School Dist.*, 171 Minn. 142, 214 N.W. 18 (1927). It is impossible to say whether the attitude of the Ohio Supreme Court on this issue has changed in the last seventy years.

In the interests of public safety, courts have required fortune tellers and persons canvassing in behalf of a religious publication to get licenses though their religious beliefs prompted them to carry on such activities. *Hass* v. *State*, 26 O.C.C. (N.S.) 545, 28 C.D. 1 (1917); *St. Louis* v. *Helscher*, 295 Mo. 293, 242 S.W. 652 (1922); *State* v. *Neitzel*, 69 Wash. 567, 125 Pac. 939 (1912); *Maplewood Twp.* v. *Albright*, 13 N.J. Misc. 46, 176 Atl. 194 (N. J., 1935).

The 14th Amendment places a limitation on a state's power in addition to any which may be included in the state constitution. Religious freedom is included in the liberties protected from invasion except by due process of law. *Meyer* v. *Nebraska*, *supra.* But, in relation to an exercise of the police power, due process is not violated except where the

regulatory action is arbitrary or unreasonable. *Near* v. *Minnesota*, 283 U.S. 697, 51 S. Ct. 625, 75 L. ed. 1357 (1931); *Haskell* v. *Howard*, 269 Ill. 550, 109 N.E. 992 (1915); *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. ed. 1070 (1925).

A board of education in Ohio has the power to expel a pupil upon a two-thirds vote of its members, G.C. 7685, and if the rule, for the violation of which the pupil is expelled, is within the power of the board, expulsion is allowable. *Sewell* v. *Board of Ed.*, *supra*. In the absence of any express grant of power, pupils have been denied admittance to public schools in the interests of the public welfare. *New Braunfels* v. *Waldschmidt*, *supra*. Thus, the courts would probably interfere in a case of expulsion only if the board abused its discretion. The constitutionality of such action would depend on the considerations mentioned above.

If, before November 5, 1935, the Jehovah's Witnesses had established a private school with one of their own number as teacher, the teacher would have been required to take a special oath of allegiance to the United States government. G.C. 7852-1, 7852-2, 7852-3. This would have raised a problem similar to that relating to the pupils in the public schools. However, these sections have been repealed, 116 Ohio Laws 548, and the difficulty is thus avoided.

The constitutionality of the rules adopted by the boards of education in the situations under consideration depends on whether they have sufficient relation to the public welfare (education) to make them reasonable regulations and to keep them out of the category of an unreasonable and arbitrary interference with a personal liberty. In all likelihood, any court to which this question is presented will feel that the teaching of patriotism is sufficiently necessary and reasonable to warrant the invasion of religious freedom involved.

The obvious purpose of the boards of education is to teach patriotism. Experience has shown that that which is taught by coercion is seldom learned. If the boards act to the extent of their power, they may well defeat their own ends. Pupils who honestly object to saluting or pledging allegiance to the flag will not learn patriotism by any hypocritical actions the board may demand. The boards of education have the power, but the advantage to be gained should be considered seriously before any policy of coercive enforcement is adopted.

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